Supreme Court, U.S.
FILED
MAR 18 2010
OFFICE OF THE CLERK

No. 09-787

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA AND OLYMPUS AMERICA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Sompo Japan Insurance, Inc. (traded on the Tokyo Stock Exchange) is the parent corporation of, and owns more than 10% of the stock in, respondent Sompo Japan Insurance Company of America, Inc.

Olympus Corporation (traded on the Tokyo Stock Exchange) is the parent corporation of, and owns more than 10% of the stock in, respondent Olympus America, Inc.

No other publicly traded corporation owns 10% or more of the stock of either Respondent.

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STATEMENT

Petitioner devotes over fourteen pages to describing the facts of a case that it tries to characterize (at 2) as "essentially identical to" or (at 9) "nearly identical to" *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (No. 08-1553) and *Union Pacific Railroad Co. v. Regal-Beloit Corp.* (No. 08-1554) — the *Regal-Beloit* cases — now pending before this Court. The two cases at issue here, however, present a remarkably different scenario than the *Regal-Beloit* cases. Despite petitioner's lengthy statement, the railroad has conveniently omitted any discussion of the fact that separate bills of lading were issued for the inland carriage in both of the present cases. In *Regal-Beloit* and elsewhere, petitioner has consistently argued that a separate bill of lading is the key to triggering the application of the Carmack Amendment in the multimodal context. Thus the legal issues here have no connection to the legal issues now pending in *Regal-Beloit*. Even under petitioner's analysis, the decision below should be affirmed.

1. In *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, No. 07-5190-cv, Kubota Tractor Corporation contracted with ocean carrier Mitsui OSK Line Ltd. ("MOL") to ship thirty-two tractors from Tokyo to Georgia. Pet.App.6a. Under this contract, MOL issued three through bills of lading. Pet.App.6a. MOL contracted with CSX Intermodal ("CSXI") to arrange inland transportation from Los Angeles to Georgia. CSXI, in turn, sub-contracted with petitioner to provide transportation by rail for that leg of the journey. Pet.App.70a-71a. Under that sub-contract, petitioner issued three electronic waybills —non-negotiable bills

of lading, *see* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-11 (4th ed. 2006) — for the inland-rail transportation that were separate from the through bills of lading that MOL had issued. Pet.App.71a.

Petitioner's train derailed in Texas, destroying the shipment of tractors. Kubota recovered the full value of its loss from its insurer, respondent Sompo. Exercising its subrogation rights, Sompo brought suit against petitioner in the Southern District of New York. Pet.App.7a. The district court permitted petitioner to limits its liability to a small fraction of the damage that it had caused, Pet.App.8a-12a, but in the first appeal the Second Circuit reversed. It held that the Carmack Amendment applies to the inland rail leg of an international multimodal shipment and that petitioner was not entitled to limit its liability under the Carmack Amendment. Pet.App.22a-26a.

The Second Circuit remanded the case to determine whether petitioner had successfully contracted out of Carmack coverage. Pet.App.66a. On remand, the district court found, among other facts, that when CSXI subcontracted with petitioner, it had issued three electronic waybills for the inland-rail transportation that were separate from the through bills of lading that MOL had issued. Pet.App.71a.

2. In *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, Nos. 05-7039-cv(L), 07-4739(XAP), Olympus Optical Co. contracted with ocean carrier Kawasaki Kisen Kaisha ("K-Line") to transport four containers of digital cameras from Tokyo to New York. Pet.App.14a. Under that contract, K-Line issued a through bill of

lading. Pet.App.14a-15a. The inland transportation was arranged by RailBridge Corporation, Pet.App.16a, which sub-contracted with petitioner for rail carriage. Under that sub-contract, petitioner issued an EDI waybill (a form of bill of lading) to RailBridge for the inland-rail transportation. That inland waybill was separate from the through bill issued by K-Line. Pet.App.16a.

One of the containers was burglarized during the inland transportation. Pet.App.16a. Respondent Sompo, having insured the shipment and paid the claim, asserted its subrogation rights and filed suit against petitioner in the Southern District of New York. Pet.App.14a. The district court, following the Second Circuit's decision on the first appeal in the companion case here, held that petitioner was not entitled to limit its liability under the governing Carmack Amendment.

3. Petitioner filed a motion to consolidate the two cases in the court of appeals. The Second Circuit denied that motion but agreed to treat the cases as related and submitted them to the same merits panel — a panel over which then-Judge Sotomayor presided. On the merits, the Second Circuit followed its earlier decision and affirmed both district court decisions. Pet.App.1a-4a.

4. In *Regal-Beloit*,[1] four shipments are at issue. Because of the procedural posture in that case (on a motion to dismiss before any discovery could be taken), it has not yet been established whether petitioner issued separate bills of lading for those rail journeys. Under the Ninth Circuit's analysis, it does not matter. The

[1] Petitioner here is also a petitioner in *Regal-Beloit*.

Carmack Amendment applies in any event. But petitioner, arguing that the Carmack Amendment should not apply because no separate bills of lading were issued, recognizes that the Carmack Amendment should apply when separate bills of lading have been issued. Thus the most that petitioner should be able to achieve in *Regal-Beloit* is a remand to determine whether separate bills of lading were issued in those shipments. That is, in the event this Court in *Regal-Beloit* determines that the Carmack Amendment does not apply to that rail shipment under the through bill of lading, its holding in *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 15 (2004) compels that the case be remanded to determine whether a domestic waybill was issued by the rail carrier, and if so, the effect of its terms. Discovery on that issue was apparently never conducted in *Regal-Beloit* and so the issue could not be fully presented to the District Court. For that reason, in part, the Ninth Circuit remanded the matter, calling it contractually a "factual morass." *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 1002 n.22 (9th Cir. 2009). *See also Sompo Japan Ins. Co. of America v. Union Pac. R.R. Co.*, 456 F.3d 54, 76 (2d Cir. 2006) (remanding case to determine, *inter alia*, whether Carmack was offered via the rail carrier's domestic waybills) Pet.App.65a-66a; on remand *Sompo Japan Ins. Co. of America v. Union Pac. R.R. Co.*, No. 09 Civ. 1604, 2007 WL 2230091, at *5 (S.D.N.Y. 2007) (finding that Union Pacific's domestic rail waybills, while subject to Carmack, did not offer full Carmack liability terms), aff'd 341 Fed. Appx. 707 (2d Cir. 2009). Pet.App.76a-78a.

REASONS FOR DENYING THE PETITION

I. Under The Theory Advanced By Petitioner In The *Regal-Beloit* Cases, The Decisions Below Must Be Affirmed Regardless Of This Court's Decision

Petitioner's only rationale for this Court to show any interest in the present cases is that they are in some sense "identical to" the *Regal-Beloit* cases now pending before this Court. But this Court's disposition of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (No. 08-1553) and *Union Pacific Railroad Co. v. Regal-Beloit Corp.* (No. 08-1554) will have no effect on the resolution of the dispute here. Despite petitioner's insistence to the contrary, the facts of this case are distinguishable in a crucial way from those in *Regal-Beloit*. As the district courts held in each case, petitioner carried the cargo on the inland rail legs of multimodal journeys under separate bills of lading, not under the through bills issued by ocean carriers MOL and K Line. Pet.App.16a, 71a. This factual difference not only distinguishes the present cases from *Regal-Beloit*, but it also means that the Carmack Amendment covers the cargo at issue here even if this Court were to accept petitioner's own analysis in *Regal-Beloit*.

The issuance of separate bills of lading for the inland legs here precludes petitioner's argument that Carmack cannot apply when cargo is shipped on a through bill of lading. Petitioner relied on the absence of a separate bill of lading in crucial ways in *Regal-Beloit*. It implicitly acknowledged that the Carmack Amendment applies to the inland leg of a multimodal shipment when that leg

is covered by a separate bill of lading. UPRR *Regal-Beloit* Pet. 11, 16, 18-19, 20, 21. And its argument that this Court should reverse the Ninth Circuit in *Regal-Beloit* (because Carmack should not apply to the inland leg of a multimodal shipment) was dependent upon the absence of a separate bill of lading for that leg. UPRR *Regal-Beloit* Pet. 20, 24, 26 n.2, 30, 34, 35-36, 37.

Petitioner described as "well-established" the "rule" in the Fourth, Sixth, Seventh, and Eleventh Circuits that "the Carmack Amendment does not apply to the inland leg of a multimodal shipment under a through bill of lading." UPRR *Regal-Beloit* Pet. 16. Petitioner cited cases in each of these circuits as establishing that the Carmack Amendment does not apply to the cargo on the inland leg of a journey starting in a foreign country unless the domestic segment is covered by a separate bill of lading. *Id.* 18-19 (quoting the Eleventh Circuit's rule in *Altadis USA v. Sea Star Line, LLC*, 458 F.3d 1288, 1294 (11th Cir. 2006)); *id.* 19 (quoting the Seventh Circuit's rule in *Capital Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394 (7th Cir. 1992)); *id.* 20 (quoting the Fourth Circuit's rule in *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703 (4th Cir. 1993)); *id.* (quoting the Sixth Circuit's rule in *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 569 (6th Cir. 2003)).

Petitioner's argument for certiorari in *Regal-Beloit* hinged almost entirely upon the seemingly contrary holdings among circuits as to whether the Carmack Amendment applies to the inland domestic leg of a multimodal journey when no separate bill of lading covers that inland domestic leg. No such question is

presented here, because the district court in each case found the presence of a separate bill of lading that covered the rail leg. *See* Pet.App.71a.

Second, petitioner's argument that this Court should reverse the Ninth Circuit in *Regal-Beloit* depended upon the absence of a separate bill of lading for the inland domestic leg of a multimodal shipment. *See* UPRR *Regal-Beloit* Br. 20. In fact, petitioner described as a "threshold ground" the position that "the Carmack Amendment simply does not apply to an import shipment from a foreign country . . . moving under a through bill of lading" (as opposed to moving under a separate bill of lading for the inland leg). *Id.*; *see also id.* 24, 26 n.2, 30, 34, 35-36.

Indeed, in other litigation petitioner has affirmatively sought the application of the Carmack Amendment with respect to goods carried by an inland carrier as part of an international multimodal shipment when a separate inland bill of lading has been issued. *See, e.g., Union Pacific Railroad Co. v. Greentree Transportation Trucking Co.*, 293 F.3d 120 (3d Cir. 2002).

The presence of separate waybills—equivalent to bills of lading—that covered the domestic leg of the shipments at issue in this case means that the dispute between respondent and petitioner does not present the "identical facts" or same question this Court agreed to review in *Regal-Beloit*.

II. In Any Event, Holding This Case For *Regal-Beloit* Could Interfere With The Court's Consideration Of The *Regal-Beloit* Cases

As the preceding analysis demonstrates, this case is fundamentally different from *Regal-Beloit* and should not be held pending the outcome of *Regal-Beloit*. Even if this Court were to believe that its decision in *Regal-Beloit* would affect the decision here, however, it would still be unwise to hold this case for *Regal-Beloit*. A hold here would suggest that Justice Sotomayor should recuse herself in *Regal-Beloit*, thus preventing a full Court from considering the issues in *Regal-Beloit* (and also creating the possibility of an evenly divided Court).

Because Justice Sotomayor was a member of the Second Circuit panel that heard this case below, she will plainly recuse herself from acting on this case. *See* 28 U.S.C. § 47 ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him."); Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1838 (2003) ("[I]t has been standard practice for a justice to disqualify or recuse himself when encountering a case he or she heard sitting on a lower court.").

If this case were to be held for *Regal-Beloit*, then a decision in *Regal-Beloit* would effectively be a decision in this case, too. Accordingly, Justice Sotomayor's vote in *Regal-Beloit* would effectively be a vote in this case. Because Justice Sotomayor must recuse herself in this case, it would be appropriate for her to similarly recuse herself in *Regal-Beloit* if a decision to hold this case

makes *Regal-Beloit* the vehicle by which this case is effectively decided. In order to avoid unnecessarily diminishing the number of justices available in *Regal-Beloit*, this Court should accordingly deny the petition here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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